Supreme Court
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

MILTON LEE LEVERETTE,
Petitioner,

v.

LOUISVILLE LADDER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May Mississippi delegate to private manufacturers the authority to make private law and to legislate the "law of the case" for determining whether or not their products are defective?

PARTIES TO THE PROCEEDING

Petitioner

Milton Lee Leverette is an individual and has no corporate affiliations.

Respondent

Louisville Ladder Company

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 183 F.3d 339 (5th Cir. 1999). A copy of opinion is included in the Appendix at Appendix A at 1a - 5a. The order of the District Court for the Southern District of Mississippi is not published. The District Court ordered entry of the Final Judgment on July 15, 1998, (filed July 17, 1998) which is printed in Appendix B at 6a - 7a. Leverette's Motion for Reconsideration filed before the District Court is printed in Appendix D at 10a - 13a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 9, 1999. On July 23, 1999, Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on September 3, 1999. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment 14

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mississippi Constitution 1892, Article 4, Section 33

"The legislative power of this state shall be vested in a Legislature which shall consist of a Senate and a House of Representatives."

Mississippi Constitution 1892, Article 4, Section 88

"The Legislature shall pass general laws, under which local and private interest shall be provided for and protected and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to appeal or amendment."

Mississippi Constitution 1892, Article 4, Section 90

"The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz: (s) regulating the practice in courts of justice."

Section 11-1-63 Miss. Code Ann. (1972, as amended)

> That the manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
>
> (i)(1) The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the

same manufacturing specifications. (Emphasis by this writer)

STATEMENT OF THE CASE

The facts in this case as pertinent to this petition are not in dispute. Milton Lee Leverette was injured on March 23, 1995, when the year old Louisville ladder upon which he was standing broke causing him to fall thirty (30) feet to the ground and sustain severe and permanent injury.

On February 26, 1997, Leverette filed his Complaint against Louisville Ladder Company in the Circuit Court of Warren County, Mississippi, which matter was removed to the United States District Court for the Southern District of Mississippi on March 20, 1997.

On June 8-9, 1998, the matter proceeded to trial before the District Court. At trial, Leverette called as an expert witness Dr. Shelby Thames, who testified in the field of polymer science. At the conclusion of Dr. Thames' testimony, the District Court, noting that Dr. Thames was of the opinion that the ladder in question was defective because the polymer resins of the ladder had failed to properly adhere to the fiberglass reinforcing portions of the ladder and, further, that this defect had occurred during the manufacturing process and that the condition of the ladder presented an unreasonably dangerous condition to Lee Leverette and any other user of the ladder, entered its order excluding from the evidence the testimony of Dr. Thames on the basis that his opinion did not contradict the Defendant's position that the ladder in question was manufactured to and conformed to all ANSI standards. It was at this point in time that Leverette for the first time was made aware of the Court's interpretation of

the provisions of Section 11-1-63(a)(i)(1) Miss. Code Ann. (1972, as amended).

On June 11, 1998, prior to entry of the District Court's order of July 15, 1998, dismissing his Complaint, Leverette filed a Motion to Reconsider specifically raising before the lower court and allowing it the opportunity to review and pass upon the constitutionality of Section 11-1-63, supra.

On July 17, 1998, the District Court filed its order dismissing the Complaint whereupon Leverette filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit on July 23, 1998.

On July 9, 1999, the Fifth Circuit Court of Appeals affirmed the District Court's judgment. Petitioner's request for review was denied on September 3, 1999.

ARGUMENT FOR GRANTING THE WRIT

On March 23, 1995, Lee Leverette was seriously and permanently injured when the new Louisville ladder upon which he was standing broke causing a thirty (30) foot fall to the ground. Leverette received injuries to his shoulder, back and abdomen which necessitated two (2) surgical procedures and also caused two (2) herniated discs in his back. The recommended back surgery could not be performed because Leverette could not pay the cost thereof. Leverette now has a permanent morphine dosepak implant in his body to help with the extensive pain still caused by his back injury. At trial, Leverette's medical bills were $115,000.00.

Dr. Shelby Thames, Research Professor and head of the Polymer Science Department at the University of Southern

Mississippi, testified for Leverette in the field of polymer science. Dr. Thames explained that the fiberglass ladder was a polymer product and that he was therefore eminently qualified to express an opinion as to its makeup and any defects which may have caused or contributed to the failure of the ladder on March 23, 1995.

Dr. Thames, author of over 200 articles in the field of polymer science, and accepted as an expert witness in the courts of Mississippi, California, Oregon, Missouri, Texas, Arizona, Minnesota, Kansas, the United States District Court for the Southern District of Mississippi, and all Mississippi state courts, testified that he examined the ladder under an electron scanning microscope which revealed that there was improper adhesion between the resin portion and fiberglass portions of the ladder. Dr. Thames testified that this electron microscope testing showed without doubt that there was no adhesion between the fiberglass strand portion and the resin portion of the ladder and that the ladder suffered from improper "wedding" of the polymer to the fiberglass and that this caused a defect in the ladder. Dr. Thames testified that this defect caused the ladder's premature failure and that this defect occurred during the manufacturing process. The ultimate opinion expressed by Dr. Thames was that the ladder upon which Leverette was standing fell because of an improper adhesion of the polymer to the fiberglass and that this defect caused the sudden and complete failure of the ladder without warning.

At trial, Louisville Ladder testified that it did not use the testing methods utilized by Dr. Thames and was totally unaware of such methods and only became aware of these standards after it reviewed Dr. Thames' tests. Dr. Thames did not test the ladder to determine whether it met ANSI standards as this was not his objective. Dr. Thames'

objective, one which he met, was to determine in fact why the ladder had failed and broken under Lee Leverette's weight. Dr. Thames testified that it was impossible to test the ladder in question according to ANSI standards because ANSI standards requires destruction of any ladder being tested by these standards.

At trial Louisville Ladder presented evidence that its ladders were manufactured to ANSI standards and that the ladder in question met ANSI standards. On this basis and on the basis that Dr. Thames did not testify regarding ANSI standards, the District Court excluded the testimony of Dr. Thames from evidence and without this testimony Leverette could not prove his case.

On the basis that the case was not a design defect case, the District Court ruled that the testimony of Dr. Thames was excludable because of the terms of Section 11-1-63(a)(i)(1) Miss. Code Ann. (1972, as amended), which provides:

> That the manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
>
> (i)(1) The product was defective because it deviated in a material way from the manufacturers specifications or from otherwise identical units manufactured to the same manufacturing specifications. (Emphasis by this writer)

Thus, because the lower court ruled that since Louisville Ladder manufactured the ladder in question in

accordance with its own specifications that Dr. Thames' testimony was excludable under the provisions of Section 11-1-63(a)(i)(1), supra.

The District Court's interpretation of 11-1-63(a)(i)(1) allows an unlawful delegation of the legislative authority of the State of Mississippi. It creates a checkerboard pattern of standards for consumers who use fiberglass ladders.

This code section allows each individual manufacturer to select the standards to which its particular product will be manufactured. Provided the product actually manufactured does meet the standards selected by the manufacturer, the manufacturer cannot be held liable. This delegates legal authority to individual manufacturers not possessed by the State of Mississippi or even by the United States.

Even government standards, which may be admissible into evidence, are not dispositive as to whether or not a given product is defective.

The Michigan court in Owens v. Allis-Chalmers Corp., 326 N.W. 2d 372 (Mich. 1982) has held that while compliance by a manufacturer with governmental standards is admissible evidence, it is not conclusive as to whether or not the particular product in question is defective.

Likewise, the South Dakota court in Zacher v. Bud Co., 396 N.W. 2d 122 (S.D. 1986) has ruled that while governmental standards might constitute minimum standards, they are not conclusive as to whether or not a particular product is or is not defective.

The New York court in Lugo v. LJN Toys, Ltd., 539 N.Y.S.2d 922 (Supp. Cut. App. Div. 1st Dept. 1989) has also

held that compliance with governmental standards, while having some evidentiary value, does not absolve a manufacturer of liability.

The courts of the United States have also adopted the same rule. The Fifth Circuit Court of Appeals in Lorenz v. Celotex Corp., 896 F.2d 148 (5th Cir. 1990) ruled that compliance with governmental standards does not insulate a products liability defendant or preclude a finding of liability.

The Tenth Circuit Court of Appeals in O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987) has likewise ruled that compliance with govemmental standards is not conclusive on the issue of liability.

The District Court, and the Fifth Circuit Court of Appeals, have held that since Louisville Ladder decided to manufacture its ladders to comply with ANSI standards and since they did so that this compliance is the alpha and omega on the defect. The anomaly is that had Louisville Ladder instead complied with standards selected by a governmental body that this would not be conclusive on the issue of defectiveness.

The Fifth Circuit Court of Appeals has attempted to sidestep this constitutional issue by stating that it had not been raised for consideration by the District Court. This is simply incorrect. Immediately upon realizing the District Court's interpretation of 11-1-63(a)(i)(1), supra, Leverette filed his Motion to Reconsider on June 11, 1998, plainly presenting the unconstitutionality issue to the lower court prior to entry of its Final Order of Dismissal on July 15, 1998.

Section 11-1-63(a)(i)(1) supra, grants unto Louisville Ladder, and all other manufacturers, a power not enjoyed by

the United States Government, i.e. the power to select absolute standards by which consumer products will be judged. This constitutes an unlawful delegation of the legislative authority of the State.

Under the reasoning of the District Court, adopted by the Fifth Circuit Court of Appeals, because Louisville Ladder chose to manufacture the particular ladder in question to ANSI standards, the ladder cannot be defective when it breaks under a consumer's body weight if the failure is not related to ANSI standards. Louisville Ladder can thereby put a product on the market which has a total lack of adhesion between the component parts of this ladder, which can cause the ladder to fail, yet is afforded complete immunity under the interpretation of Section 11-1-63(a)(i)(1) adopted by the District Court and Court of Appeals.

Section 11-1-63(a)(i)(1), supra, grants unto each different manufacturer of any given product the legal authority to adopt whatever standards it may wish for the manufacture of its product. A given manufacturer may select a high standard of quality or a low standard of quality. So long as a manufacturer meets even the lowest of standards selected by it, the District Court's ruling has the effect of holding that, so long as the product meets the standards arbitrarily selected by each manufacturer, the product cannot be defective as a matter of law.

This causes obvious unequal results to occur. If manufacturer A adopts a breaking standard of 100 pounds per square inch (psi) for its ladder and a particular ladder fails at 75 psi then manufacturer A is liable. However, should manufacturer B select a breaking standard of 50 psi for its ladder and its ladder breaks at 75 psi, manufacturer B is not

liable as a matter of law under the District Court's and Court of Appeals' ruling.

At trial, the expert witness and corporate representative for Louisville Ladder testified that Louisville Ladder did not even have any manufacturing specifications which related to a standard for the proper bonding to be obtained between the fiberglass portions and resin portions of its ladders. Thus by not adopting any standard at all, Louisville Ladder has been allowed to place a defective product on the market and Louisville Ladder is immune so long as the ladder does not fail its own arbitrarily selected ANSI standards.

The unequal results seen in a comparison of the 100 psi ladder made by manufacturer A and the 50 psi ladder made by manufacturer B undeniably results in a denial of equal protection under the law.

Amendment 14 to the United States Constitution provides, inter alia, that Mississippi shall not, "deny to any person within its jurisdiction equal protection of the laws."

Obviously, Section 11-1-63, supra, causes a consumer who purchases a ladder manufactured by manufacturer B (i.e. 50 psi) to receive less than the same protection under the law as a consumer who purchased a ladder from manufacturer A (i.e. 100 psi). A different set of legal standards is being applied to each consumer depending upon the legal standard or specifications arbitrarily selected by any given manufacturer.

In Sweatt v. Murphy, 733 So.2d 207 (Miss. 1999), the Mississippi Supreme Court overruled an interpretation of the Mississippi Residential Landlord and Tenant Act, Section 89-

81, et seq., Miss. Code Ann. (1972, as amended), which would have resulted in unequal results and unequal protection of the law, stating:

> One commentator, in discussing the concurring opinion in O'Cain interpreted the opinion as a positive step away from a scheme under which standards of habitability are determined pursuant to housing codes, which may differ from one municipality to another.

University of Mississippi law professor Deborah Bell writes that:

> General obligations to repair, or warranties of habitability, are imposed as a matter of public policy; courts, or legislatures, have determined that residential tenants should be afforded a minimum standards of habitability in their homes. The policy applies equally to all tenants, and should not be tied to the chance decision of the municipality to enact a housing code. The better approach to general maintenance obligations and a state checkerboarded with codes is a general standard of minimum habitability with reference to available codes as a guideline. (Emphasis by this writer)

Thus, the Mississippi Supreme Court has stated that it will not allow a "checkerboard" pattern of codes which result in unequal results dependent upon which code is adopted by which municipality.

Yet Section 11-1-63(a)(i)(1), supra, on its face allows manufacturers to adopt different and varying standards for the manufacture of their particular products and thereby create a "state checkerboarded" with different manufacturing standards each of which become the law of each individual case.

Under Section 11-1-63(a)(i)(1) a consumer who purchases a ladder manufactured by manufacturer B is not receiving the same equal protection of the law as a consumer who purchases a ladder from manufacturer A. A different set of legal standards is being applied according to the standards the manufacturing selected by any given manufacturer.

Article 4, Section 88, of the Mississippi Constitution of 1892 provides that the Mississippi Legislature shall pass only general laws and shall not pass private laws. Section 11-1-63(a)(1)(i) is obviously a private law since, depending upon the standards selected by any given manufacturer, its product will be judged by a different set of standards with different results for different consumers.

Section 11-1-63(a)(i)(1), supra, also allows each manufacturer to legislate the legal standards by which its product will be judged. This unlawful delegation of power is in direct violation of Article 4, Section 33, of the Mississippi Constitution of 1892 which provides that the legislative power of the State of Mississippi is only vested in the Legislature. Certainly granting the power to adopt and set the legal standards by which products are judged is a grant of legislative power to individual manufacturers which cannot be allowed.

Article 4, Section 90, of the Mississippi Constitution further provides that the Mississippi Legislature shall not pass

local, private or special laws. Under Section 11-1-63(a)(i)(1) if a manufacturer does not manufacture its product up to governmental standards, it is not necessarily liable, while if it manufactures its product to its own arbitrarily selected standards, it is immune from liability. This amounts to private law and is a denial of due process and equal protection under the law and is an unlawful delegation of the legislative power of the state. The Mississippi Legislature is not free to delegate its lawmaking authorities even to other branches of the government, Alcorn v. Hamer, 38 Miss. 652 much less to private manufacturing concerns.

CONCLUSION

Section 11-1-63(a)(1)(i) Miss. Code Ann. (1972, as amended) is an unlawful delegation of the legislative power of the State to private manufacturers. It allows the creation of a checkerboard pattern of standards resulting in denial of due process and equal protection under the laws to the ultimate users of consumer products.

It grants unto each individual manufacturer a power not possessed by the State of Mississippi nor possessed by the United States of America, i.e. the power to set absolute standards by which the defectiveness of its product will be judged in court.

The Petition for Writ of Certiorari should be granted. Otherwise, consumers in Mississippi will continue to suffer from a denial of equal protection and a denial of due process by manufacturers being allowed to create private legislation. This denies injured consumers access to and recourse in the courts of the State of Mississippi and the United States and as such is unconstitutional.

Both the District Court and the Fifth Circuit Court of Appeals sidestepped this issue. Hopefully, this Court will address the issue as similar statutes have been adopted in states other than Mississippi.

Respectfully submitted,

MILTON LEE LEVERETTE

/s/ _____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed July 9, 1999]

No. 98-60488

MILTON LEE LEVERETTE, *Plaintiff-Appellant,*	)
v.	)
LOUISVILLE LADDER COMPANY *Defendant-Appellee.*	)

Appeal from the United States District Court
For the Southern District of Mississippi
(5:97-CV-58-Br-S)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Milton Lee Leverette brought suit against Louisville Ladder Company asserting that manufacturing defects were responsible for injuries suffered in a work-related fall. The district court, excluding Leverette's expert's testimony, granted Louisville Ladder's Motion for Judgment as a Matter of Law. Leverette appeals. We AFFIRM.

I. FACTS AND PROCEEDINGS

In March, 1995, Milton Lee Leverette was working for Vicksburg Video as a cable installer and technician. As a part of his work duties, Leverette used a 28-foot fiberglass extension ladder to check and install cable on utility poles. While working on March 25, 1995, Leverette placed his ladder against the utility pole to check the cable of one of his customers. As he reached the third rung from the top, the ladder broke in half, and Leverette fell approximately 30 feet to the ground. Leverette suffered severe injuries to his shoulder, back, and abdomen, requiring two surgeries.

Leverette filed a complaint against the manufacturer of the ladder, Louisville Ladder Company, under the Mississippi Product Liability Act ("MPLA") alleging that he suffered severe personal injuries as a result of a manufacturing defect. Leverette enlisted the assistance of Dr. Shelby Thames, a professor of chemistry and polymer sciences at the University of Southern Mississippi. Upon completion of the discovery deposition of Dr. Thames, Louisville Ladder filed a Motion for Summary Judgment and further, filed a Motion to Exclude the testimony of Dr. Thames pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court denied both Motions. Louisville Ladder also moved to strike Dr. Thames' testimony on the ground that

Leverette failed to produce a list of the cases that its expert had testified in the past four years and the amount that they were paying Dr. Thames, pursuant to Fed. R. Civ. P. 26. The district court ordered Leverette to produce the expert information within five days.

Prior to trial, Louisville Ladder renewed its *Daubert* motion and requested the court to strike Dr. Thames' testimony because the Rule 26 expert information was not provided.

At trial, Leverette called Dr. Thames who opined that the ladder had a manufacturing defect because there was no adhesion between the fiberglass and the polymer matrix making up the ladder. At the conclusion of Dr. Thames' testimony, the district court ruled that Dr. Thames' testimony was irrelevant and excluded his testimony. The district court subsequently granted Louisville Ladder's Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50.

II. DISCUSSION

We review the district court's decision to grant a Motion for Judgment as a Matter of Law *de novo*. *See Garcia v. Woman's Hosp. of Texas*, 97 F.3d 810, 812 (5th Cir. 1996). We consider all the evidence in the light and with all inferences most favorable to the party opposed to the motion. *See Ikerd v. Blair*, 101 F.3d 430, 432 (5th Cir. 1996). We review the district court's decision to exclude expert testimony for an abuse of discretion. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997); *Moore v. Ashland Chemical Inc.*, 151 F.3d 269, 274 (5th Cir. 1998) .

Leverette contends that the district court abused its discretion in excluding Dr. Thames' testimony on the ladder's manufacturing defect. The district court, relying on *Daubert*, Fed. R. Evid. 702, and Fed. R. Evid. 703, excluded the testimony, ruling that the testimony was irrelevant to proving that the ladder had a manufacturing defect. We hold that the district court did not abuse its discretion in excluding the expert's testimony for a lack of relevance.

To prevail in a products liability case under Mississippi law, the plaintiff must prove, at the time the product left control of the manufacturer or seller, "[t]he product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications. . . ." Miss. Code. Ann. § 11-1-63 (a) (i) (1).

Louisville Ladder manufactures its ladders to meet specifications under the American Natienal Standard Institute ("ANSI"). The ANSI standards provide a set of minimum performance and dimensional requirements for the manufacture of products. ANSI A14.5 specifies materials to be used in manufacturing, the properties of the materials, the types ef tests to be performed, and minimum test results. Further, the ANSI relies on the American Society of Testing and Materials ("ASTM") for performing strength, physical, and mechanical property tests for fiberglass.

The district court ruled, and we agree, that Dr. Thames failed to assess whether the ladder met ANSI standards in accordance with the requirements under Mississippi law. The district court did not abuse its discretion.

Leverette now contends that this Court should apply a risk-utility analysis to the ladder under *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993) to find that it was a defective product. The risk-utility analysis applies to design defects case, not manufacturing defect cases. *See* Miss. Code. Ann. § 11-1-63(a) (i) (1), (b). "The Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory." *See Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996). Leverette did not assert a design defect theory and cannot present this issue on appeal.

Finally, Leverette contends that the district court should have considered his Motion for Reconsideration to challenge the constitutionality of the MPLA. This Court will not consider an issue that a party fails to raise in the district court absent extraordinary circumstances, *see North Alamo Water Supply Corp. v. City of San Juan Texas*, 90 F.3d 910, 916 (5th Cir. 1996) (declining to consider constitutional challenge to statute on appeal), and generally speaking, we will not consider an issue raised for the first time in a Motion for Reconsideration. *See Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990).

III. CONCLUSION

For the foregoing reasons, the district court's opinion is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

[Filed July 17, 1998]

No. 5:97cv58BrS

MILTON LEE LEVERETTE)
Plaintiff)
)
v.)
)
LOUISVILLE LADDER CO., INC.)
Defendant)
)

JUDGMENT
Entered: July 15, 1998

This matter was tried before the Court on June 8 and 9, 1998. The Court, after considering the evidence and law in this case, granted defendant's Motion for a Judgment as a Matter of Law and dismissed Milton Leverette's case;

IT IS ORDERED ADJUDGED AND DECREED that there be Judgment in favor of defendant, Louisville Ladder Corp., and against plaintiff, Milton Lee Leverette, dismissing said plaintiff's Complaint with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs associated with this matter are to be taxed to the plaintiff.

Natchez, Mississippi, this 15th day of July, 1998.

/s/_____
Judge, David Bramlette

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed September 3, 1999]

No. 98-60488

MILTON LEE LEVERETTE
Plaintiff - Appellant

v.

LOUISVILLE LADDER CO, INC.
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before DAVIS, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG- 2

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

[Filed June 11, 1998]

No. 5:97cv58BrS

MILTON LEE LEVERETTE *Plaintiff*	)
v.	)
LOUISVILLE LADDER CO., INC. *Defendants*	)

MOTION FOR RECONSIDERATION

COMES NOW Milton Lee Leverette, through counsel, and prior to entry of this Court's Judgment on its Order excluding the evidence and testimony of Dr. Shelby Thames and prior to entry of its Rule 50 Judgment, files this his Motion for Reconsideration so as to allow this Court to consider and pass upon the following, to-wit:

I.

That §13-1-63(a) (i) (1) Miss. Code Ann. (1972, as amended) is unconstitutional.

II.

Article 4, §88 of the Mississippi Constitution of 1892 provides that the legislature shall pass general laws as opposed to private laws.

III.

Article 4, §90 of the Mississippi Constitution of 1892 provides that the legislature shall not pass local, private or special laws.

IV.

Article 4, §33 of the Mississippi Constitution of 1892 provides that the legislative power of the State of Mississippi shall be vested in the legislature.

V.

The Mississippi legislature cannot delegate to the whole of the people or any portion of the people, or to any other department of the government, its powers to make laws. Alcorn v. Hamer, 38 Miss. 652.

VI.

That §11-1-63 (a) (i) (1) amounts to a private law in that each individual manufacturer of any given product is allowed to set its own unique specifications for the manufacture of its product. Said Code Section then allows such manufacturer's specifications to become the standard by which each manufacturer's product is measured and/or judged regarding whether or not said product constitutes a defective product or an unsafe product and thereby allows each individual manufacturer's unique standards to become the "law of the case" and "private law."

VII.

That because §11-1-63 (a) (i) (1) allows each individual manufacturer to establish private law and to provide for unequal standards for any given manufacturer, same is unconstitutional.

VIII.

That allowing different and individual manufacturers to decide which different specifications to which they will manufacture their product and then allowing said products to be judged by the peculiar standards selected by any given manufacturer amounts to a denial of due process of law under the Constitution of 1892 and the United States Constitution.

IX.

That the aforesaid §11-1-63 (a) (i) (1) amounts to an unlawful delegation of the legislative powers of the State of Mississippi to private manufacturers and entities in violation of Article 1, Section 2 and Article 4, Section 33 of the Mississippi Constitution of 1892.

X.

That for each and all of the aforesaid reasons, §11-1-63(a) (i) (1) is unconstitutional and should be declared void and unconstitutional by this Court and this Court's Order excluding the testimony of Dr. Shelby Thames and entering its Rule 50 Judgment should be reconsidered and set aside.

Respectfully submitted,

/s/_____
DAVID M. SESSUMS, Attorney for
Milton Lee Leverette

OF COUNSEL:

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APPENDIX E

MISSISSIPPI CODE ANN. (1972, AS AMENDED)

§ 11-1-63. Product liability actions; conditions for liability; what constitutes defective product.

In any action for damages caused by a product except for commercial damage to the product itself:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i)1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant jnstifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or

seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

(e) in any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to subsection (a) shall

indemnify a product seller for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller has given prompt notice of the suit to the manufacturer within thirty (30) days of the filing of the complaint against the seller.

(h) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

SOURCES: Laws, 1993, ch. 302, § 1, eff from and after July 1, 1993.

Supreme Court, U.S.
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(2)

No. 99-884

IN THE

Supreme Court of the United States

MILTON LEE LEVERETTE,

Petitioner,

v.

LOUISVILLE LADDER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Should this Court grant the Petition to review the constitutionality of the Mississippi Products Liability Act when the constitutional challenge was raised after Petitioner lost the trial on the merits?

(2) Should this Court address the constitutional issue made the subject of the Petition when the case may be decided on other grounds: Petitioner's failure to comply with Rule 26 of the Federal Rules of Civil Procedure?

(3) Does the burden of proof in a manufacturing defect case under the Mississippi Products Liability Act allow manufacturers to make "private law"?

LIST OF PARTIES, PARENTS AND SUBSIDIARIES

The parties to the proceedings below were Petitioner Milton Lee Leverette and Respondent Louisville Ladder Company, Inc. Louisville Ladder Company, Inc. is a wholly owned subsidiary of Emerson Electric Co.

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Southern District Of Mississippi, Western Division Dated May 19, 1998 And Filed May 27, 1998 ..... 16a

The Petition presents no ground specified in Rule 10 of this Court. The constitutional issue the Petition professes to present is one of Petitioner's own invention. Petitioner's sole claim at trial — that the ladder made the subject of the case suffered from a manufacturing defect — failed because Petitioner offered no evidence that the ladder deviated from Respondent's manufacturing standards. The evidence offered by Petitioner might have supported a design defect claim except that: (1) Petitioner chose not to make such a claim; and (2) no evidence of an alternative design was presented as required by Mississippi law. In short, this case involves nothing more than the failure of Petitioner's evidence to match his legal theory. After losing the case at trial, Petitioner attempted to re-characterize this failure of proof as a constitutional issue. The untimely constitutional challenge made the subject of the Petition is frivolous. Consequently, Respondent requests that the Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDER BELOW

Some relevant Opinions and Orders are found in the Appendix to the Petition for Writ of Certiorari. However, the Petition does not include the basis for the trial court's exclusion of the testimony of Petitioner's expert and the granting of Respondent's Motion to Dismiss the case pursuant to Fed. R. Civ. P. 50. Included as Appendix "A" of this brief are pp. 304-321 of the trial transcript, which constitutes the opinion of the trial court concerning the admissibility of the expert testimony tendered by Petitioner and the trial court's ruling on Respondent's Rule 50 motion. Appendix "B" is the trial court's May 27, 1998 Memorandum Opinion and Order, which required Petitioner to satisfy the pre-trial disclosure requirements of Fed. R. Civ. P. 26 within 5 days.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeal's decision affirming the trial court's dismissal was issued on July 9, 1999. The Order denying rehearing by the panel or *en banc* was lodged on September 3, 1999. The Petition for Certiorari was filed on November 26, 1999.

RULE INVOLVED

In addition to the constitutional and statutory provisions cited in the Petition, Fed. R. Civ. P. 26(a)(2) is relevant to this case:

> **(2) Disclosure of Expert Testimony.**
>
> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, the disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in

forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

COUNTERSTATEMENT OF THE CASE

This is a products liability claim under Mississippi law. Petitioner allegedly fell and was injured when a fiberglass extension ladder manufactured by Respondent broke.[1] The sole basis of Petitioner's Complaint was that the subject ladder broke due to a manufacturing defect. In discovery, in the Pre-Trial Order and in representations to the Court on

1. Defendant Louisville Ladder Company, Inc. is referred to "Louisville Ladder" as well as "Respondent". Plaintiff Milton Lee Leverette is identified as "Leverette" as well as "Petitioner".

the morning of trial, Petitioner's counsel steadfastly maintained that Leverette made no claim that the ladder was defective in design. Petitioner retained Dr. Shelby Thames, an expert in polymer science, to support the manufacturing defect theory.

The case proceeded to trial on June 8, 1999. On June 9, 1999, the trial court allowed Petitioner's expert, Dr. Thames, to testify, while reserving a ruling on objections raised by Respondent. The trial court granted Respondent's motion to exclude the testimony of Dr. Thames at the conclusion of the expert's testimony on two grounds. First, the Court found that the testimony of Dr. Thames was inadmissible under Federal Rules of Evidence 402 and 702. Dr. Thames was unfamiliar with Louisville Ladder's manufacturing standards and could not say that the subject ladder deviated from those standards as required to establish a manufacturing defect under Mississippi law. Second, the trial court emphasized that Petitioner's failure to comply with the pre-trial disclosure requirements regarding experts embodied in Fed. R. Civ. P. 26 constituted an independent basis to exclude Dr. Thames' testimony. Petitioner's counsel conceded that without Dr. Thames' testimony, Leverette could not establish a *prima facie* claim. The trial court granted Louisville Ladder's Motion for Judgment as a Matter of Law under Fed. R. Civ. 50 at the conclusion of Petitioner's case.

On June 11, 1998, two days after the trial, Petitioner filed a Motion for Reconsideration[2]. In asking the trial court to set aside its prior ruling, Petitioner did not dispute that Dr. Thames' testimony was inadmissible on the manufacturing defect theory or that Petitioner had failed to

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2. Appendix "D" to the Petition at 10a-13a.

satisfy the pre-trial disclosure requirements of Fed. R. Civ. P. 26. Instead, for the first time, Petitioner asserted that the manufacturing defect standard embodied in the Mississippi Products Liability Act, § 11-1-63(a)(1)(i), Miss. Code Ann. (1972, as amended)[3], is unconstitutional. This untimely constitutional challenge was summarily rejected by the Fifth Circuit.[4] It is this component of the Fifth Circuit's ruling which constitutes the sole basis for the Petition.

COUNTERSTATEMENT OF FACTS

Petitioner has not fairly or accurately recounted the facts and proceedings below. Respondent believes that the following summary offers a more balanced presentation.

A. Background

- On March 25, 1995, Petitioner was injured in the course of his employment as a cable installer/technician with Vicksburg Video. Leverette alleges that he had climbed to third rung from the top of a 28-foot fiberglass extension ladder manufactured by Louisville Ladder when the ladder broke causing him to fall.[5]

- The subject ladder was purchased by Vicksburg video and assigned to Leverette in February, 1994. Leverette testified that he used the ladder 50-100 times per week in the 13 months preceding his accident.[6]

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3. *See* Appendix "E" to the Petition, pp. 14a-17a.

4. *See* Appendix "A" to the Petition, p. 5a.

5. Tr. Vol. 6, pp. 28, 47.

6. Tr. Vol. 6, pp. 92-93; 104.

- Petitioner noticed a crack in the middle of the 14-foot base section of the fiberglass ladder several days before his accident.[7] Leverette report the crack to his supervisor, but elected to continue to use the ladder.[8] Petitioner chose this course of action despite having read explicit warnings on the product advising **"Never use a damaged ladder" and "Destroy ladder if damaged, worn or exposed to fire and chemicals".**[9]

- On February 26, 1997, Petitioner sued Respondent in the Circuit Court of Warren County, Mississippi. Louisville Ladder removed the case to the United States District Court for the Southern District of Mississippi, Western Division.

B. ANSI A14.5 (1992)

- The American National Standards Institute, Inc. published ANSI A14.5 (1992), Standard for Ladders — Portable Reinforced Plastic — Safety Requirements. ANSI A14.5 (1992) was the consensus standard for the design and testing of portable fiberglass ladders applicable at the time of the manufacture of the subject ladder.[10]

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7. Tr. Vol. 6, pp. 47-51; 95-96.

8. Tr. Vol. 6, pp. 48-50; 96-100.

9. Tr. Vol. 6, pp. 88-89; 100-101.

10. A complete copy of ANSI A14.5 (1992) is located in the record at Tr. Vol. 2, pp. 180-270.

- ANSI A14.5 (1992) also contains standards and testing procedures which relate to the manufacture of the fiberglass railing component of a ladder.

- The ANSI standard specifies the materials to be used in the manufacture of fiberglass (Section 7), the requisite physical and mechanical properties (Section 7.9), the tests which should be performed to evaluate the fiberglass (Section 7), and the minimum test results.

- ANSI A14.5 references in Section 7 standards developed by the American Society for Testing and Materials (ASTM), which, in turn, dictate how to perform tests for flexural strength and modulus, compressive strength and modulus, tensile strength and modulus, and notched izod impact strength.

- Mike Van Bree, a Louisville Ladder engineer, testified during the course of Petitioner's case in chief that the ANSI standards constitute the manufacturing specification utilized by Louisville Ladder with respect to the fiberglass railing component of Respondent's product.[11]

- In short, in this case the ANSI specifications amounted to more than an industry design standard; ANSI A14.5 (1992) was the benchmark by which Louisville Ladder measured the quality of the fiberglass railing it used in the production of ladders.[12] So long as the fiberglass

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11. Tr. Vol. 7, pp. 197-199.

12. The Petition cites several cases for the proposition that industry standards are not dispositive on the issue of liability. *See* Petition, pp. 7-8. While these cases correctly state the law in a design defect claim, they are irrelevant to this manufacturing defect case where ANSI A14.5 (1992) is Respondent's manufacturing specification.

railing met ANSI A14.5, there was by definition no deviation from Louisville Ladder's manufacturing specifications and no manufacturing defect.

C. Petitioner Chose to Proceed Solely on a Manufacturing Defect Theory

- The Mississippi Products Liability Act ("MPLA"), § 11-1-63, Miss. Code Ann. (1972, as amended), recognizes four theories of recovery: (1) design defect; (2) failure to warn; (3) express warranty; and (4) manufacturing defect.[13]

- Proof of an alternative design is an essential element of a design claim under the MPLA. *See* § 11-1-63(f)(ii), Miss. Code Ann. (1972, as amended). In response to written discovery Petitioner stated he did not allege the ladder in question had a design defect because he could not identify an alternative design.

- A product has a manufacturing defect under the MPLA if it "deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured with the same manufacturing specifications." Section 11-1-63(a)(i)(1), Miss. Code Ann. (1972, as amended).

- In order to ensure that there was no confusion at trial over Petitioner's theory of the case, Respondent filed a motion in limine to exclude any evidence regarding a design defect, warning or warranty claim.[14] The following exchange took place when the motion in limine was addressed on the morning of trial:

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13. *See* Appendix "E" of Petition, p. 14a.

14. Tr. Vol. 5, pp. 883-884.

THE COURT: The issue is what road does the plaintiff travel? Does the plaintiff travel the manufacturing defect road, does the plaintiff travel the design defect road or the negligence path? Which one? I'll hear from Mr. Sessums and Mr. Varner on that in due course. The second motion in limine, you have a motion in limine to exclude any evidence regarding the design defect, any warnings, testimony or consideration of any warranty claim. What does Mr. Sessums say to that?

MR. SESSUMS: Your Honor, our whole case from the start has always been there was a manufacturing defect, that the polymer didn't bind to the fiberglass that occurred in the manufacturing process that the made the product inherently unsafe . . . We're not going to try how to design ladders. We're not going to talk about negligence.

THE COURT: That motion will be sustained. It's not being urged by the plaintiff, that theory (design defect theory).[15]

D. Dr. Shelby Thames' Opinion

- Petitioner retained Dr. Shelby Thames, a polymer science expert, to evaluate the subject ladder.

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15. Tr. Vol. 6, pp. 3-4.

- Dr. Thames' opinion was based upon four examinations or tests on the subject ladder: (1) a Differential Scanning Calorimetry; (2) a Thermographic Analysis; (3) an examination using an Environmental Scanning Electron Microscope; and (4) a three-part bend or flexural test.[16]

- The use of the Differential Scanning Calorimetry, Thermographic Analysis and Environmental Scanning Electron Microscope by Dr. Thames were neither based upon nor have any relevance to the ANSI A14.5 manufacturing specification employed by Louisville Ladder.[17]

- The three point bend evaluation conducted on samples of fiberglass taken from the railing of the ladder were similar to but not identical to the testing procedure utilized in ANSI A14.5 (1992). The strength exhibited by the fiberglass samples in Dr. Thames' testing exceeded the strength requirements imposed by ANSI A14.5 (1992).[18] In short, according to Dr. Thames' own testing, the fiberglass railing of the subject ladder met Louisville Ladder's manufacturing standard.

- The Differential Scanning Calorimetry and Thermographic Analysis were designed to determine whether the fracture of the railing was caused by thermal instability. Dr. Thames' tests were negative; the railing contained no thermal instability.[19]

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16. Tr. Vol. 2, pp. 176-178.

17. Tr. Vol. 7, p. 188.

18. Tr. Vol. 7, p. 201.

19. Tr. Vol. 2, pp. 176-178.

- The Environmental Scanning Electron Microscope provided Dr. Thames with nothing more than a magnified view of the fiberglass. Based upon his subjective examination using the Environmental Scanning Electron Microscope, Dr. Thames concluded that the ladder possessed a manufacturing defect because the reinforcing fibers allegedly did not properly adhere to the polymer.[20]

- Dr. Thames testified that he did not make any effort to determine if the ladder met Louisville Ladder's manufacturing specifications:

  Q. Dr. Thames, you are aware, sir, that the allegations in this case are that the ladder involved in Mr. Leverette's accident had a manufacturing defect.

  A. I think I said that.

  Q. Do you know what L.L.'s manufacturing specifications are that they use and that they follow in manufacturing fiberglass extension ladders?

  A. No sir, that's not important to me. . . .

  Q. And in this particular case, Dr. Thames, you have never made any effort to determine whether the ladder involved in this particular case met L.L.'s manufacturing specifications.

  A. That's correct.[21]

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20. Tr. Vol. 7, pp. 266-267; 275-276.

21. Tr. Vol. 7, pp. 235-237.

E. Petitioner's Failure to Comply with Fed. R. Civ. P. 26

- Pursuant to Fed. R. Civ. P. 26(a)(2) and the Uniform Local Rules for the Southern District of Mississippi, Petitioner was required to produce (1) a list of cases in which Dr. Thames had testified at trial or by deposition within the preceding four years, and (2) the amount Dr. Thames had been paid for his services.

- Petitioner did not provide the required information.

- Louisville Ladder moved to exclude the testimony of Dr. Thames based upon Fed. R. Evid. 702 and 703 and Petitioner's failure to provide the requisite disclosure.

- On May 27, 1998, the trial court entered a Memorandum Opinion and Order [illegible]nying Respondent's motion to exclude Leverette's expert based upon the Federal Rules of Evidence. The Order allowed Petitioner five days to provide the necessary expert disclosure, absent which the Court would revisit Louisville Ladder's motion to exclude.[22]

- Petitioner ignored the Court's Order.

- At trial, Louisville Ladder re-urged its motion to prohibit Dr. Thames from testifying based upon Petitioner's failure to comply with Rule 26, the local rules and the Court's May 27, 1999 Opinion and Order.

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22. *See* Appendix "B" to this Brief, pp. 26a-27a.

F. Dismissal by the Trial Court

- The trial court excluded Dr. Thames' testimony because Petitioner's expert did not address whether the ladder had a manufacturing defect as defined by the MPLA:

> I will say that notwithstanding the expertise of Dr. Thames as a polymer scientist, he did say quite candidly that he's not familiar with the specs of the Louisville Ladder Company. He's not familiar with the ANSI standards. He is — he's not an expert in ladders. That's not to say he has to be an expert in ladders. But when you put it all together and consider it as a whole, I think there's a failure here to meet the statutory requirements.
>
> Now, so what we have essentially is the raw opinion of an eminently qualified man in his field, but the raw opinion without the necessary statutory components: Did the product meet the manufacturer's specifications? Don't know. Did the product differ from otherwise identical units? I don't know.
>
> I don't see how in the world I could possibly allow the testimony and do my job because I am absolutely convinced that a court of review will send it back to me on the fastest thing smoking coming this way after they read it because of this.[23]

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23. *See* Appendix "A" to this Brief, pp. 5a-6a.

- Additionally, the trial court precluded Dr. Thames from testifying due to Petitioner's failure to comply with the pre-trial disclosure requirements of Fed. R. Civ. P. 26 and the trial court's May 27, 1999 Order:

> I'm just simply going to say in this case that the failure to produce these cases and the follow up on the court's order, wherein I did direct there be within five days a submission of the cases, standing alone, that is not the reason for my ruling; but I do have to consider that, and I do consider that as one of the reasons in support of my decision here this afternoon . . .
>
> Rule 26 is a rule that we all must follow; and when we don't follow it, sometimes judges give us some additional time, and that was done in this case. But as I say, I'm looking — ladies and gentlemen, I'm looking to the overall picture, the big picture, rather than trying to pick out one little aspect here and one little aspect there. I'm looking at the big picture, and the big picture tells me that the only thing I can do is to sustain the objection and strike the testimony of the witness and instruct the jury to disregard.[24]

- Petitioner's counsel conceded that Petitioner could not make out a *prima facie* case absent the testimony of Dr. Thames.

- Petitioner rested after the exclusion of Dr. Thames' testimony. The trial court granted Louisville Ladder's motion to dismiss.

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24. *See* Appendix "A" to this Brief, p. 7a.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL CHALLENGE MADE THE SUBJECT OF THE PETITION IS UNTIMELY

Petitioner's case was dismissed because he could not prove a manufacturing defect as defined by the plain language of the MPLA. Two days after the trial, Leverette asserted for the first time that the MPLA was unconstitutional in his motion for reconsideration. The Petition strains credulity in attempting to transform Leverette's delay into prompt action. According to the Petition, Leverette mounted a constitutional challenge "[i]mmediately upon realizing the District Court's interpretation of 11-1-63(a)(i)(1)"[25] of the MPLA. This assertion is nonsense. There could be no surprise in the trial court's interpretation of the MPLA to require Leverette to establish that the ladder "deviated in a material way" from Louisville Ladder's specifications because there is no other reasonable interpretation of this straightforward and uncomplicated statute.

The Fifth Circuit summarily dismissed Petitioner's untimely constitutional challenge. The Fifth Circuit panel noted that, absent exceptional circumstances, the appellate court would not consider an issue raised for the first time in a motion for reconsideration.[26] The panel unanimously held that no such exceptional circumstances were presented by

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25. Petition, p. 8.

26. *See* Appendix "A" to the Petition, p. 5a; *citing Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990).

this case and no member of the Fifth Circuit concluded that rehearing was warranted. The Petition presents no legitimate claim that the Fifth Circuit misapplied the law. There can be no doubt that an untimely constitutional argument will ordinarily be ignored on appeal. In the end, the question the Petition presents is whether the judges of the Fifth Circuit abused their discretion in refusing to consider Petitioner's constitutional argument on the merits. This fact-intensive determination is simply not worthy of review by the Supreme Court of the United States.

II.

THIS COURT SHOULD NOT ADDRESS THE CONSTITUTIONAL ISSUE MADE THE SUBJECT OF THE PETITION BECAUSE THE CASE MAY BE DECIDED BASED UPON PETITIONER'S FAILURE TO COMPLY WITH FED. R. CIV. P. 26.

It is well-settled that a constitutional question should not be addressed when the issues in a case are such that the case may be decided on other grounds. *Trembling Prairie Land v. Verspoor*, 145 F.3d 686 (5th Cir. 1998); *Felder v. McCotter*, 765 F.2d 1245 (5th Cir. 1985), *cert. denied*, 475 U.S. 1111 (1985). This case squarely presents a basis for the exclusion of Dr. Thames' testimony which is unrelated to Petitioner's constitutional challenge. Petitioner failed to comply with the pre-trial disclosure requirements of Fed. R. Civ. P. 26(a)(2) and the trial court's May 27, 1999 Memorandum Opinion and Order regarding expert discovery. This failure was cited by the trial court as a basis for Dr. Thames' testimony.[27]

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27. *See* Appendix "A" to this Brief, p. 7a.

The Petition does not address the trial court's finding that Petitioner's violation of Rule 26 and the trial court's own order justified the exclusion of Dr. Thames' testimony. Thus, even if the court granted the Petition and subsequently determined that the MPLA is unconstitutional, the trial court's exclusion of Dr. Thames would be unaffected. Under the circumstances, no purpose is served by the granting of the Petition.

III.

THE BURDEN OF PROOF IN A MANUFACTURING DEFECT CASE UNDER THE MPLA DOES NOT ALLOW MANUFACTURERS TO MAKE PRIVATE LAW

Under the MPLA a plaintiff may establish that a product had a manufacturing defect by proving that "it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured with the same manufacturing specifications." Section 11-1-63, Miss. Code Ann. (1972, as amended). The standard employed by the MPLA was taken from § 402A of the Restatement (Second) Torts and represents no change from prior Mississippi law. McIntosh, Phillip, *Tort Report in Mississippi: An Appraisal of the New Law of Products Liability, Part II*, 17 Miss. Col. Law Rev. 277, 308 (1997). This same standard is consistently employed by courts throughout the United States in manufacturing defect cases.[28] Thus, in reality, the petition

28. *See, e.g., In re: TMJ Implants Products Liv. Lit.*, 872 F. Supp. 1019, 1024 (D. Minn. 1995) ("A manufacturing defect exists only where an item is substandard when compared to other identical units off the assembly line."); *Jones by Jones v. Ledderly Labs*, 695 F. Supp. 700, 706 (E.D. N.Y. 1988) ("A defectively

(Cont'd)

challenges more than a simple provision of the MPLA. Instead, Leverette contends that the manufacturing defect standard employed uniformly throughout the country is unconstitutional.

Petitioner's constitutional argument is absurd. In presenting the argument, Petitioner sets up a straw man: If manufacturers can set their own manufacturing standards they can produce substandard products with impunity.[29] The Petition proceeds as if proof of a manufacturing defect is the sole basis upon which a manufacturer can be sued. Petitioner conveniently ignores the fact that the manufacturer of a substandard product could be subjected to a claim that the product was defective in design. The MPLA allows precisely such a claim. Petitioner elected to proceed only on a manufacturing defect theory.

Leverette contends that the MPLA is a "private" or "special" law in that each manufacturer is to allow to set the manufacturing specifications for its products. This allegation

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(Cont'd)

manufactured product deviates in some material way from its design or performance standards."); *Ashley v. General Motors Corp.*, 666 So. 2d 1320 (La. Ct. App. 1996); *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 776 (Mo. Ct. App. 1995) ("Simply put, a manufacturing defect occurs when 'something goes wrong in the manufacturing process and the product is not in its intended condition.' The product is evaluated against the producer's own standards, and compared to like products.") (citations omitted); *Nerud v. Haybuster Mfg., Inc.*, 340 N.W.2d 369, 373-74 (Neb. 1983) (A manufacturing defect is one "in which the product differs from the specifications and plan of the manufacturer."

29. *See* Petition, pp. 9-10.

is untrue because the MPLA operates uniformly on all persons and corporations subject to its operation. *See, e.g., Secretary of State v. Wiesenberg*, 633 So. 2d 983 (Miss. 1994); *Loden v. Mississippi Public Service Commission*, 279 So. 2d 636 (Miss. 1973). Every citizen who wishes to pursue a products liability claim must prove the elements outlined in the MPLA. Similarly, every manufacturer will be responsible for damages if an injured plaintiff can meet the criteria articulated in § 11-1-63 of the Mississippi Code.

Petitioner's expert testified that there was inadequate binding between the reinforcing fibers and the resin of the fiberglass railing of the subject ladder, but he could not establish a manufacturing defect because he had no evidence that the subject ladder deviated from Louisville Ladder's manufacturing specifications. The evidence offered by plaintiff would have established a design defect, except that: (1) Petitioner chose to not make such a claim; and (2) Leverette had no evidence of an alternative design. In the end, this case involves a simple failure of proof in a products liability case, not a constitutional issue and certainly not an issue worthy of review by this Court.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRIAL TRANSCRIPT DATED JUNE 8-9, 1998

* * *

THE COURT: All right, sir. The ruling of the court is as follows and for the following reasons. As a prelude, let me say I haven't had a chance to take the time necessary to give a very cogent and well-expressed opinion on this issue. I would have had time to do so if I would have rendered this opinion tomorrow morning and have tonight to perhaps get my thoughts better organized.

But let me say preliminarily that the law of products liability is a moving target. It has been a moving target for some time. We have a proliferation of cases on our dockets involving all kinds of failures and design defects and manufacturing defects and all kinds of products throughout the manufacturing industry from baby rattlers to 18-wheelers to jet aircraft and everything also.

It seems to me that the Mississippi legislature codified the law when it did, not many years ago, borrowing from 402(a), the restatement pretty much in its entirety with some minor changes. But at any rate, the legislature codified and adopted statutes or a statute which deals with products liability, and it sets up certain parameters. There haven't been many cases dealing with this statute. There have been hundreds of cases dealing with common law on this subject but not that many dealing with the statute.

I don't agree with Mr. Sessums when he says that if I, as a district judge in this case, follow this statute, then the plaintiff simply cannot prove his case. I disagree with that,

and I disagree with it for this reason: The expert — let me say initially Dr. Thames is a very qualified, eminently qualified expert, a recognized expert in this state and throughout this country in his field of polymer science, chemical engineering and chemistry. And I have great admiration for Dr. Thames for several reasons, first of all, because of his record and second of all because he didn't come into this court and try to manufacture something. He came into this court and told it exactly like he sees it.

Now, we have all seen experts. Experts are out there in every field; and for a certain sum of money, you can find an expert who will tell you what you want to hear. Experts are excluded all the time from federal court and state court by judges who look at what they are saying and try to decide is this a viable scientific theory or is it just guesswork, speculation or something that comes off the typewriter of this person. Here Dr. Thames has, in my opinion, been very forthright and very honest in his opinion. As I said, I have great respect for him.

But to get back to the point. There are two roads you can travel, and I've used that metaphor three times or four times now. You can travel the manufacturing defect road or you can travel the design defect road, but you have got to travel one or both. And here it seems to me that the plaintiff has been unable to travel either for whatever reasons there may be. Maybe the facts don't underwrite the opinion that the plaintiff needs to be able to get this case to a jury.

Let's talk about both of them. We've talked about the design defect. The design defect the statute says specifically

that that's — there must be an alternative design, and there has been none proffered in this case, either in discovery or at trial. And so we move to the manufacturing defect because that's the approach that the plaintiff has elected to take and to concentrate on. And plaintiff's expert, in his opinion, said that there is a defect in the manufacturing process. But the statute says and Mr. Sessums recognizes, at least by implication, that there are parameters that the restatement and that the codification of the law by the Mississippi legislature have established, and those requirements are that the product did not meet the manufacturing standards or the manufacturer's specifications or, secondly, that the product differs from otherwise identical units.

Now, if you follow what Mr. Sessums has said, he says, if we can't show that, then we're out of the ball game. We can clear the park. But that's not really so because that's why you have the design defect approach. That's why you have design defect. This statute covers all possibilities, and it was intended to cover all possibilities, and it was you don't — if you don't have an error at the press or at the mold or at the plant, if you don't have an error right there as to one particular product, one particular automobile, one particular tire or in this case one ladder, then you go to the design defect and you show reasonable alternatives or alternative design.

I am quite confident there are cases that will fall through the cracks in this statute, but what I have before me is a statute telling me to apply two rules when you're dealing with a manufacturer's defect, and I have spoken to them already.

So when you consider this equation, why is this product defective or why is this product dangerous or why doesn't it meet the standards. You have two routes that you can take. You can take one or perhaps even both; but in this case, I don't think the plaintiff has taken either one. And it's not through any fault of counsel necessarily or any fault of the expert because this man testified to what he thought was right under the conditions, and his testimony was really sort of a res ipsa loquitur concept because he said. You've got a broken ladder; something caused it and we put it under a microscope and it was weak right here and the polymer didn't bond and this is what caused it, but that's not going far enough.

It's not going far enough under the statute. Daubert took up a good part of the defendant's brief or briefs, but I'm not going to go into an elaborate dissertation, if I can use that term to sound self-serving, but an elaborate statement, shall I say, on Daubert. It's not necessary here. Daubert is always pertinent, I think, because our courts have said Daubert applies not only to a scientific theory, but it also deals with just the mechanic who comes up and testifies. Look I've been dealing with carburetors all my life. This car didn't pass the other car because when he put the gas to it, the float didn't work; and the float didn't work because they had a screw made out of plastic instead of metal. A mechanic can testify, but when he testifies and he qualifies as an expert, you still put the Daubert test to him. You do in this state and in this circuit. You don't in all circuits but you do here.

The purpose of Daubert, it seems to me, was to liberalize the rules, to allow the experts more leeway to testify and not

just apply one standard, which came out under Frey but rather to apply a variety of standards according to the justice who wrote the opinion and all the judges that signed off on it, Justice O'Connor.

And if you apply Daubert, in my opinion this case would probably not meet the Daubert standards now that I've heard all of the evidence — the purported testimony. We dealt with Daubert in our memorandum opinion; and at that time, I had every reason to believe that this was going to be a design case and that an alternative design might be the approach that would be taken. Had I known then what I know now, I probably would have granted summary judgment. The design aspect of it has been negated, and I understand the reasons why.

So where does that leave us? I will say that notwithstanding the expertise of Dr. Thames as a polymer scientist, he did say quite candidly that he's not familiar with the specs of the Louisville Ladder Company. He's not familiar with the ANSI standards. He is — he's not an expert in ladders. That's not to say he has to be an expert in ladders. But when you put it all together and consider it as a whole, I think there's a failure here to meet the statutory requirements.

Now, so what we have essentially is the raw opinion of an eminently qualified man in his told, but the raw opinion without the necessary statutory components: Did the product meet the manufacturers specifications? Don't know. Did the product differ from otherwise identical units? I don't know.

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I don't see how in the world I could possibly allow the testimony and do my job because I am absolutely convinced that a court of review will send It back to me on the fastest thing smoking coming this way after they read it because of this. And again, I hasten to say again and be repetitious that I don't chastise anyone for that. I think it's just the way the case unfolds.

Now, let's talk about Rule 26, my view of that Rule 26 is very specific. It tells you what, what a lawyer must do and a plaintiff or a defendant must do in producing the name of an expert. There are requirements that must be met, and one of those things is that you must give the names of the cases.

I don't have the written rule, but I believe it says that. It says here that there shall be provided a list of any other cases that the witness has testified in as an expert at trial or by deposition within the preceding four years. Now, that was not done. And I have tried to analyze for you and for myself what this failure means to the defendant and to this court and what should be done about it.

This is a discretionary matter with the court, and the court could sustain the objection to the plaintiffs expert based on that alone, I did not do that. I did not do that because I wanted to give the plaintiff every opportunity to show me how it was unimportant or how the failure to respond should be overlooked.

And perhaps if the expert had reached the necessary threshold on other issues, then I would overlook or somehow try to justify this failure. I don't like to sanction attorneys.

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On one occasion there was sort of a spontaneous sanction that I granted or imposed upon one lawyer who was disrespectful to me and to the court. I don't like to do that. I hope I never have to do it again, and I'm certainly not going to do it with these lawyers because they are all very respectable and very professional, but — and I'm talking about monetary sanctions. I don't like monetary sanctions. I like to stay away from them, and I'm not going to do that.

I'm just simply going to say in this case that the failure to produce these cases and to follow up on the court's order, wherein I did direct that there be within five days a submission of the cases, standing alone, that is not the reason for my ruling: but I do have to consider that, and I do consider that as one of the reasons in support of my decision here this afternoon.

There's no need for me to address what I would have done had there not been this other problem that I've addressed.

Rule 26 is a rule that we all must follow, and when we don't follow it, sometimes judges give us some additional time, and that was done in this case. But as I say, I'm looking — ladies and gentlemen, I'm looking to the overall picture, the big picture, rather than trying to pick out one little aspect here and one little aspect there. I'm looking at the big picture, and the big picture tells me that the only thing I can do is to sustain the objection and strike the testimony of the witness and instruct the jury to disregard.

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The reason I took it in front of the jury is because I realize that this is the only expert the plaintiffs have got, and without an export their case probably fails. Had there been other experts, I would not have done it that way. I would have taken the time, the necessary time, to have the jury sit out while we flesh all of this out.

But because of the fact that there's only one expert, I chose to do it this way. And let me say this: This is not the first time that we've had a case fail from the plaintiff's view based upon this statute and based upon the inability of a plaintiff to rise to the necessary level.

I had a case in Biloxi not long ago very similar or to this, and I granted a Rule 50, and I granted it for the same reason that I have stricken the testimony of Dr. Thames.

That's the ruling of the court, gentlemen. And we can proceed — I look to the plaintiff for his responses to how we're going to proceed from this point on.

MR. SESSUMS: If it please the court, we have other witnesses to call; but when we get to the conclusion of those — that testimony — we have three employees from Vicksburg Video to testify as to there was no abuse of the ladder as to the crack or no crack in the ladder, the inspection of the ladder by the supervisor. And we have some doctors' depositions left and the plaintiff's wife left, and that would conclude our testimony. But even at the conclusion of that testimony, that's not going to get us past the provisions of the code section just referred to by Your Honor.

So I don't know procedurally where exactly that leads us. It's a futile thing to do. I don't want to say we want to quit and go home now and take it up to the Fifth Circuit. But the net effect is when we get through doing that, that's what Your Honor is going to have to do without Dr. Thames' testimony.

THE COURT: Well, by way of guidance I can tell you what happened in the case in Biloxi, not that you want to do what that attorney did. But he called — he did exactly what you said. He made a proffer. And in his proffer he said that we have other witnesses, none of which would go to the gravamen of the case, that is, was the product defective or was there a defect: in the manufacturing process or in the design process. He conceded that for the record. He said we have other witnesses we do not choose to call them, but we're not waiving anything to be able to call them later.

He pondered his appeal, and he was going to take it from that point on because that's — that is the issue that was squarely before the court then; it's the issue squarely before the court now. And he decided to appeal or not to appeal. I don't know what happened to it. It's been some time ago, and his appeal time has since lapsed.

But what I'm saying to you is if you want to do that, if you want to step down now and take it up with Mr. Leverette and decide whether you want to appeal it and if you do take it to the Fifth Circuit, the Fifth Circuit may certify it to the Mississippi Supreme — the Supreme Court or they may affirm it or they may send it back to me and tell me to study my lesson better. So it's up to you, Mr. Sessums. You're not

going to waive it by doing what you want to. I'm not urging you one way or the other.

There would have to be a motion for a Rule 50 by the defendant, which there would be if you decided not to call any witnesses at this time. Based on the record before me I would affirm that motion.

MR SESSUMS: Judge, I —I think by way of proffer, we would offer that we would call Gene Johnston —

THE COURT: All right, sir.

MR. SESSUMS: — to testify — this is by way of proffer. We're not going to call him. That he would testify that the ladder in question had been used by Vicksburg Video for some 13 months, that —

MR. BROWN: Your Honor, as a suggestion, we might proffer their depositions.

MR SESSUMS: No. Your Honor, I had rather make a proffer rather than the deposition testimony taken by the defendants. Gene Johnson, if called to testify would testify that Lee Leverette was a good, model employee of Vicksburg Video, that he took care of his equipment, that Lee's job attendance was excellent, that his work attitude was excellent, that he hired him back after the injury, that Lee Leverette returned to work and tried to work but could not do the light duty work, that Lee Leverette could not do light paperwork. He could tell he was hurting, that Vicksburg Video uses Louisville Ladders exclusively, that he had never in he life seen a break on a ladder like this before.

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We would also call Danny Whitaker, who was Mr. Leverette's supervisor. If he testified, Mr. Whitaker would be expected to testify that Lee Leverette was a good employee, was safety conscious, that Lee Leverette was conscious of others' equipment and safety, that Lee never misused his equipment, that he reported what he thought was a crack, that Mr. Whitaker's duties as a supervisor when something like this occurred would be to make an immediate inspection of the ladder, which he did, that he made an inspection of Mr. Leverette's ladder. He could find no crack whatsoever in the ladder.

He would be testifying of Mr. Leverette's work duties. He would be — Mr. Whitaker would testify as to how ladders were routinely and customarily stored. He would testify that he had never seen a break like this before. And on the ladder in question, that while the crack was reported possibly only in one leg, that both legs of the subject ladder broke.

When he inspected the ladder, Mr. Whitaker did not consider the ladder unsafe, that even if it had a slight hairline crack in it, he would not have considered it dangerous, that he would have gotten up on the ladder that he inspected there at Mr. Leverette's request.

We would also call Mark Doyle to testify as to the chain of custody of the ladder, that he identified the correct ladder to Dr. Thames and that the ladder went direct from the possession of Dr. Thames — from Vicksburg Video to Dr. Thames, that a section of the ladder had been cut off between the two visits by Dr. Thames by some unknown persons at Vicksburg Video.

Through Mr. Mark Doyle we would produce into evidence or offer into evidence an exemplar ladder actually used by Mr. Mark Doyle which has been used for several years now in excess of the time period Mr. Leverette used his ladder and that Mr. Leverette's ladder was in much better condition than the ladder Mr. Doyle is still using.

Lastly we would introduce the deposition testimony of the physicians listed on our witness list and in conclusion introduce the testimony of Ms. Margie Leverette who would testify as to the damages occasioned by — to her husband by the accident in question. That would conclude our proffer, Your Honor.

THE COURT: All right.

MR. SESSUMS: Lastly, Your Honor, we did have Dr. Gerald Lee from Mississippi College coming here tomorrow. And if allowed to testify or if tendered to testify, he would testify that Mr. Leverette, based upon his age, income at the time of the injury, inflation and other pertinent factors to be explained by Dr. Lee, that Mr. Leverette had a loss of future income as set forth in the — I think its 259,000 as set forth in our pretrial order. Thank you, Your Honor.

THE COURT: All right. Thank you. Do the defendants accept that proffer?

MR. SILVERSTEIN: Judge, we do not agree that that was an accurate recital of the witness' testimony. Frankly, I'm not sure — I've never heard a proffer being made with a lawyer standing up saying what a witness would say, but I

would simply submit that the best evidence as to what these witnesses would say would be their own depositions which have been taken. But for the record, I do not stipulate or accept his summary of the facts on those witnesses.

THE COURT: Well, I think the issue, Counselor, is whether or not you want him to put them on the stand and give you an opportunity to cross-examine. I think that's the issue that we're dealing with here. There may be some variance between what the witness said in his deposition and what Mr. Sessums' recollection of it is. And it wasn't to purposely mislead, I'm sure, but there may be some variance there.

But the issue is: He has made a proffer really to expedite the trial more than anything else, sort of a procedural thing, saying that this is what he would do. And then I don't see that it's necessary that you agree with what he said, but I think it is probably necessary — and it may not be necessary. Let me think through it. You can't require him to put on witnesses. He made a proffer primarily for the purpose of appeal. There's nothing in that proffer that's going to change my opinion regarding Dr. Thames. All right. There's nothing in that proffer that would give the plaintiff — would make a jury question out of this issue. So that's where we are essentially. Do you understand?

MR. SILVERSTEIN: Yes, sir, Judge, and I certainly have no objection with him proffering the witnesses' testimony in that vein. I just didn't want to be on the record as stipulating those as the facts in this case.

THE COURT: I understand there may be another trial some day and somebody might look back at this record and said you agreed to it then.

MR. SILVERSTEIN: That's what I'm saying. I have no objection to him proffering for the appeal, by making that statement. But I want the record to reflect we are not stipulating that is their testimony or that that's sort of — the witnesses if called to testify would offer those same facts.

THE COURT: With that, Mr. Sessums, what does the plaintiff say?

MR SESSUMS: We would rest at that point. Your Honor.

THE COURT: All right. Does the defendant have a motion?

MR. BROWN: Your Honor, Louisville Ladder moves for a judgment as a matter of law based upon Your Honor's ruling.

THE COURT: All right. The judgment as a matter of law will be granted under Rule 50 for the reasons heretofore stated and that is simply that this case without the testimony of an expert who meets the — who testifies under the statute and under the law and who opines to the extent that the case should be submitted to the jury, that is, gives substantial — gives evidence which rises to the level of creating an issue of fact and without that, the plaintiff's case fails. And that's something we have discussed earlier inasmuch as I have stricken the testimony of Dr. Thames.

All right. That will be the ruling of the court. I need to get the jury in, ladies and gentlemen, and to explain to them what has happened here. Does anyone wish to make a statement to me before I do that?

* * *

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION DATED MAY 19, 1998 AND FILED MAY 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. 5:97cv58BrS

MILTON LEE LEVERETTE

PLAINTIFF

VERSUS

LOUISVILLE LADDER CO., INC.

DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motion of the defendant, Louisville Ladder Co., Inc., to exclude the testimony of Shelby F. Thames, Ph.D. (docket entry # 50). After reviewing the motions, briefs, applicable statutory and case law, and being otherwise fully advised in the premises, the Court finds as follows:

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I. FACTS

In the present case, the plaintiff was injured when the ladder on which he was standing broke. The plaintiff subsequently filed suit against the defendant, alleging, among other things, that the ladder was defectively designed. According to the plaintiff's expert, the ladder broke because there was no adhesion between the fiberglass and the polymer matrix making up the ladder. When this occurs, according to Dr. Thames, the polymers will age and eventually become embrittled. The defendant filed the present motion, arguing that the Court should exclude the testimony of Dr. Thames because: (1) he is not qualified to offer expert testimony regarding the ladder at issue; (2) his opinions constitute speculation; and (3) his methodology is fundamentally flawed.

II. DISCUSSION

A. STANDARD

Under Rule 702 of the Federal rules of Evidence, an expert witness may testify if he is qualified and if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." The Supreme Court discussed the standard for admitting expert testimony under the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the *Daubert* Court limited its discussion to a scientific context, the *Daubert* analysis is equally relevant to expert testimony about non-scientific, technical evidence. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990-91 (5th Cir. 1997) (holding that *Daubert* analysis applies to testimony other than strictly scientific testimony).

Essentially, for expert testimony to be admissible it must be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The "relevance" requirement ensures that an expert's opinion will be helpful to the trier of fact. *Weinstein's Federal Evidence*, § 702.05(2), 2nd Ed. (1997). The "reliability" requirement is designed to exclude so-called "junk science." *Daubert*, 509 U.S. at 593. This requirement ensures that knowledge offered is "more than subjective belief or unsupported speculation." *Id.* Expert testimony must be supported by "appropriate validation — i.e., 'good grounds,' based on what is known." *Id.* In assessing the validity of expert testimony, the court's focus should be on the expert's principles and methods used, not on his conclusions generated. *Id.*

While *Daubert* articulated standards for determining the reliability of expert testimony, the case "did not otherwise work a sea of change over federal evidence law." *United States v. 14.38 Acres of Land, Sit. in Leflore Cty., Ms.*, 80 F.3d 1074, 1078 (5th Cir. 1996). A trial court's "gate keeping" function does not replace the traditional adversarial system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Therefore, in determining whether to exclude expert testimony as unreliable, trial courts must act "with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *14.38 Acres of*

Land, 80 F.3d at 1077 (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

In the present case, Dr. Thames has opined that the ladder at issue was defectively designed. His opinion is based largely on an examination he made of the ladder utilizing an electron microscope. An electron microscope is capable of magnifying an image hundreds of thousands of times. Using the electron microscope, Dr. Thames looked at both the failed sections of the ladder and at other sections. Dr. Thames explained that the results of the electron microscope showed that fiberglass strands that were used to reinforce the material were not properly adhered to the polymer matrix. Dr. Thames explained that the ladder in question was a composite ladder made up of more than one material and that the composites work in harmony to provide strength.

He explained that the polymer is the continuous phase of the ladder which is supposed to bond to the fiberglass strands placed into the polymer to provide additional strength. He further explained that in order for this bonding to occur, and for the additional strength to be achieved, there has to be adhesion between the polymer matrix and the fiberglass strands. When there is no adhesion between the fiberglass strands and the polymer, the property of the polymer is actually degraded. Dr. Thames explained that his examination of the ladder in question showed no adhesion between the polymer and fiberglass strands.

In explaining his findings, Dr. Thames referred to an example from an academically recognized textbook. *Polymer Microscopy*. Samples of the ladder, according to Dr. Thames,

were almost mirror images of the examples from this textbook showing examples of no adhesion versus examples of adhesion. He testified that this showed beyond a shadow of a doubt that there was no adhesion between the polymer matrix and the glass-filled rod.

As mentioned, the defendant objects to the testimony of Dr. Thames, arguing that (1) he is not qualified to offer expert testimony regarding the ladder at issue; (2) his opinions constitute speculation; and (3) his methodology is fundamentally flawed. The Court will address each of these objections in turn.

1. QUALIFICATIONS

The plaintiff's expert, Dr. Shelby Thames, has been hired as an expert in polymer science. Dr. Thames holds a B.S. Degree and a Masters Degree in Chemistry from the University of Southern Mississippi and a Ph.D. in chemistry from the University of Tennessee. Dr. Thames has been a professor for the University of Southern Mississippi since 1964, having taught courses in freshman chemistry, analytical chemistry, organic chemistry at the undergraduate and graduate levels and graduate courses in polymer science. In 1970, Dr. Thames formed the Department of Polymer Science at USM.

Initially, the defendant argues that Dr. Thames is not qualified in the present action because he has never done any work pertaining to ladders. In its brief, the defendant states:

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> Dr. Thames has never been employed in any capacity other than as a professor at the U.S.M.. More particularly, he has never worked for a company or entity that has designed, manufactured or tested a ladder. He has also never been employed by a company that has designed, manufactured or tested a fiberglass product. Additionally, he has never written or published any articles, books or treaties (sic) on ladders or fiberglass products.

In support of this contention, the defendant cites an unpublished opinion out of the Western District of Michigan. *See Fayas v. Louisville Ladder Corp.*, Civil Action No. 2:96cv86 (W.D. Mich. 1997). In *Fayas*, the court excluded the testimony of a mechanical engineer essentially because the engineer had no experience in ladder design. However, the expert in *Fayas* was being offered to apply engineering principles as they applied to the design of the ladder. In other words, the opinion of the expert in *Fayas* would only apply when applied to a ladder. It would clearly be important, in such a case, for the expert to have worked specifically with ladders.

In the present case, Dr. Thames is being offered as an expert in polymer science. Essentially, polymer scientists study the synthesis of long chain molecules. It appears to the Court that whether Dr. Thames has studied polymer science in relation to ladders is of no consequence. He is not opining about any aspect of the ladder other than its molecular make up. Dr. Thames has simply examined a section of material and opined as to whether the polymers in

the material are properly adhered to a fiberglass reinforcement. This area appears to the Court to be an area for which Dr. Thames is perfectly suited, and thus the Court finds that Dr. Thames' qualifications are adequate to defeat the defendant's motion in this regard.

2. SPECULATION AND FLAWED METHODOLOGY

The defendant also objects to the testimony of Dr. Thames, arguing that "his opinions constitute speculation and his methodology is fundamentally flawed." The defendant supports this argument with an analysis of the four "*Daubert* factors."

The first *Daubert* factor concerns the existence of and potential for testing the theory or technique at issue. *Daubert*, 509 U.S. at 593. With regard to this factor, the defendant points out that ANSI A14.5 mandates that certain tests, including the flexural strength and modulus test, compressive strength and modulus test, tensile strength and modulus test, and notched izod impact strength test be performed to test the strength of the fiberglass rails. In addition, the defendant explains that ANSI A14.5 references ASTM which, in turn, provides the protocol for these tests. According to the defendant's expert the accident ladder exceeded all ANSI requirements under each of these tests.

The defendant also states that Dr. Thames only performed the flexural test, and his results show that the subject ladder fell within ANSI standards. However, Dr. Thames based his decision, that the ladder was defectively designed, largely on his findings using the

electron microscope. The defendant argues that basing findings on tests other than those set forth under ANSI when the subject ladder surpassed ANSI standards, constitutes a flaw in Dr. Thames' methodology.

Despite the defendant's contention, the Fifth Circuit has held "that compliance with [government standards] is not conclusive as a measure of defectiveness or unreasonable danger." *See Simien v. S.S. Kresge Co.*, 566 F.2d 551, 557 (5th Cir. 1978). However, the Fifth Circuit did go on to explain that when a product meets government standards, the plaintiff will have to produce *substantial* expert or lay evidence that the product is nevertheless unreasonably dangerous. *Simien*, 566 F.2d at 558.

In the present case, the plaintiff has put on evidence that despite meeting ANSI standards, an electron microscope reveals that, in Dr. Thames' opinion, the fiberglass was not properly adhered to the polymer matrix. For purposes of the present motion, the Court finds that the plaintiff has shown the existence of and potential for testing Dr. Thames' theory or technique. Using an electron microscope is a technique used by scientists throughout the field of polymer science. The Court does not find anything in Dr. Thames' methods that support exclusion with regard to the first *Daubert* factor.

The second *Daubert* factor concerns peer review and publication. *Daubert*, 509 U.S. at 593. The defendant argues that looking at the ladder at issue with the assistance of an electron microscope is not required by ANSI A14.5 or any other standard or code. The defendant then states, "Thus, the ESEM [electron microscope] has not been accepted by

the scientific or technical community as a test or standard in examining the strength or mechanical properties of a fiberglass rail." The Court is not willing to make such an assumption. The fact that a test is not required by government standards does not necessarily mean that it has not been "accepted" by the scientific field. In fact, it could mean that such a test is too easily met. On the other hand, a test may not be required because it is seen as too demanding. Perhaps a test could be seen as too costly, making the production of a useful product impractical to produce. Nevertheless, as discussed *supra,* government standards are not the final word in product liability actions.[1]

The defendant also points out that Dr. Thames has never published any articles, books, or treatises on ladders or fiberglass products. However, as discussed *supra*, Dr. Thames is being offered as an expert in polymer science. His opinions deal with the ladder at issue from a molecular stand point, particularly the structure as it pertains to the polymer matrix. Dr. Thames, as can be seen in his curriculum vitae, has written numerous articles on this topic. Therefore,

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1. This is not to say, however, that by meeting the standards, the defendant does not help its cause. In fact the Fifth Circuit reversed a jury verdict where a wooden ladder complying with or exceeding in its design all relevant OSHA and industry standards was found by the jury to be nevertheless unreasonably dangerous. *See Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (5th Cir. 1979). The court noted that while meeting the government standards was not conclusive, the evidence put on by the plaintiff to counter the standards must be substantial. *Id.* at 1019. The court found the plaintiff's evidence to be "sketchy and meager," and therefore reversed the jury's verdict, holding that the trial court should have directed a verdict in favor of the defendant. *Id.* at 1024.

the Court finds that Dr. Thames' methods have been subjected to sufficient peer review and publication to satisfy the dictates of *Daubert.*

The third *Daubert* factor focuses on the known or potential rate of error and the existence and maintenance of standards controlling the operation of the technique. *Daubert,* 509 U.S. at 594. With regard to this factor, the defendant argues that Dr. Thames' reliance on the electron microscope is likely to lead to erroneous conclusions as it does not provide any data on the actual strength of the fiberglass.

However, a test does not have to produce numerical data to be useful. In Dr. Thames' deposition, he opined that for the ladder to be safe, there must be proper adhesion between the polymer and the fiberglass reinforcement. He also pointed out that the images produced via the electron microscope were almost identical to images reproduced in the textbook *Polymer Microscopy*, depicting no adhesion versus examples of adhesion. In the Court's opinion, such data is sufficient to comply with the third *Daubert* factor.

The fourth and final factor listed in the *Daubert* opinion concerns general acceptance. *Id.* The *Daubert* Court noted that wide spread acceptance can be an important factor in ruling particular evidence admissible, and a known technique that has been able to attract only minimal support within the community may be viewed with skepticism. The defendant points to the ANSI standards as the accepted manner in which ladders are to be tested. The Court agrees.

The Court also agrees, however, that an electron microscope is a generally accepted method used to examine polymer structure. Dr. Thames wanted to determine whether there was proper adhesion between the polymer and fiberglass, and thus he looked at sections of the ladder under an electron microscope. For purposes of such an analysis, the electron microscope is certainly generally accepted. Accordingly, the Court finds that the testimony of Dr. Thames regarding the ladder at issue is sufficient to surpass each factor set forth by the Supreme Court in *Daubert.*

3. COMPLIANCE WITH THE RULES OF DISCOVERY

Finally, the defendant asks the Court to strike the testimony of Dr. Thames because the plaintiff has not disclosed the compensation he is to be paid. The plaintiff has also failed to list any other cases in which Dr. Thames has testified as an expert or by deposition within the preceding four years. These disclosures are clearly mandated by the Uniform Civil Justice Expense and Delay Reduction Plan and the Federal Rules of Civil Procedure.

The Court notes that the plaintiff has provided no explanation in his response as to why he has not provided the information. However, it is well established that this Court wields broad discretion in discovery matters. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996); *Coughlin v. Lee*, 948 F.2d 1152, 1159 (5th Cir. 1991). Accordingly, the Court hereby orders the plaintiff to make such disclosures within five (5) days of entry of this order. If such

disclosures are not made, the Court will revisit the motion at that time.

III. CONCLUSION

The defendant filed the present motion in order to exclude the testimony of the plaintiff's expert, Dr. Shelby Thames. Dr. Thames is being offered as an expert in polymer science. The defendant bases its argument on the premise that Dr. Thames is not qualified to testify as an expert in the present case. Additionally, the defendant argues that the testimony of Dr. Thames is based on speculation and flawed methodology.

The Court finds that the plaintiff's expert is eminently qualified to testify in the field of polymer science. Dr. Thames has a Ph.D. in chemistry and formed the Department of Polymer Science at the University of Southern Mississippi. The Court also finds that Dr. Thames' methodology holds up under a *Daubert* analysis. Dr. Thames will testify that the ladder at issue was defectively designed because the polymer matrix was not properly adhered to the fiberglass reinforcement. He formed this opinion by examining the material making up the ladder under an electron microscope. After applying the four *Daubert* factors to Dr. Thames' methodology, the Court is convinced that the plaintiff's expert should be allowed to testify. Accordingly, the Court finds that the defendant's motion should be, and is hereby, DENIED.

SO ORDERED, this the 19th day of May 1998.

s/ David Braulette
UNITED STATES DISTRICT JUDGE